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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**ARKANSAS ELECTRIC COOPERATIVE CORPORATION
PETITION FOR DECLARATORY ORDER**



**OPENING COMMENTS OF
NORFOLK SOUTHERN RAILWAY COMPANY**

**ENTERED
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Part of
Public Record**

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Dated: March 16, 2010

Norfolk Southern Railway Company (“NS”) submits these Opening Comments in accordance with the Board’s December 1, 2010 order instituting this declaratory order proceeding (“Dec. 1 Order”). Although NS takes no position on the reasonableness of the specific tariff provisions at issue in this proceeding, NS is submitting these comments to urge the Board to adhere to its established practice of considering the reasonableness of individual railroad practices on a case-by-case basis. Particularly in a case like this one, where the Board has recognized “the factually intense nature of the dispute” (Dec. 1 Order at 3), the Board should take care that its resolution of this fact-specific case does not unduly limit carriers’ discretion to adopt appropriate tariff provisions in different factual circumstances.

NS is a Class I freight railroad based in Norfolk, VA. NS operates over more than 21,000 route miles in 22 eastern states, the District of Columbia and Canada, and it provides transportation services to thousands of customers shipping hundreds of different commodities. NS has established and published numerous common carrier rates (*i.e.*, “tariffs”), conditions of carriage, and rules to govern shipments under them. While NS does not currently have a tariff provision similar to the BNSF tariff provision at issue in these proceedings, NS has an interest in ensuring that railroads retain their statutorily-guaranteed ability to adopt reasonable tariff provisions to address as yet unforeseen circumstances or situations.

Railroading is a dynamic business, and railroads need the flexibility to respond to situations as they develop. Congress recognized this in the Interstate Commerce Act, which gives railroads authority to establish reasonable rules and practices governing their transportation services. 49 U.S.C. §§ 10702(2). Congress thus guaranteed that railroads will be able to adopt practices that respond to the wide variety of circumstances that may arise in the course of providing rail transportation services – without seeking regulatory preapproval. This right is

particularly important because it is not possible for railroads to foresee all the circumstances that might affect rail service.

Railroads' statutory right to establish reasonable rules and practices is subject, of course, to the Board's power to adjudicate the reasonableness of such rules and practices upon complaint. 49 U.S.C. § 10704(a)(1). Congress did not set a standard for determining what constitutes an "unreasonable" practice, and instead left that question to the Board's discretion. *See id.*; *Granite State Concrete Co. v. Surface Transp. Bd.*, 417 F.3d 85, 92 (1st Cir. 2005) ("[S]ection 10702 does not define what would be reasonable rules and practices."). The Board has recognized that the best way to exercise its discretion is to consider unreasonable practice complaints on a case-by-case basis that accounts for the specific facts at issue. As the Board reasoned in *WTL Rail Corp.—Petition for Declaratory Order & Interim Relief*, STB Docket No. 42092 (served Feb. 17, 2006):

The statute does not specifically define what constitutes an unreasonable practice. Rather, in view of the wide variety of situations that might arise, Congress has committed such determinations to the Board. The agency has developed no single test for judging whether a particular practice is unreasonable, leaving that fact-specific inquiry to a case-by-case analysis.

Id., slip op. at 6 (emphasis added); *see also North America Freight Car Ass'n v. BNSF Ry. Co.*, STB Finance Docket No. 42060 (Sub-No. 1), slip op. at 8 (served Jan. 26, 2007) (when considering unreasonable practice complaints Board "tailor[s] its analysis to the evidence proffered and arguments asserted under a particular set of facts"); *Capitol Materials Inc. – Pet. for Declaratory Order – Certain Rates & Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, slip op. at 6 (served Apr. 12, 2004) ("Whether a particular practice is unreasonable typically turns on the particular facts."). The Board's case-by-case policy follows in the footsteps of the Interstate Commerce Commission, which recognized that it could not adjudicate the lawfulness of railroad practices in the abstract. *See Illinois Cent. Gulf R.R. Co.—Security*

Deposits—Payment of Demurrage Charges, 358 I.C.C. 312, 317-18 (1978). In *Illinois Central* the ICC refused requests to rule preemptively on the reasonableness of potential railroad tariffs implementing a security deposit program to guarantee payment of demurrage charges, holding that it only had jurisdiction to assess the reasonableness of an actual, particular tariff. *Id.* at 317 n.9. The Commission went on to hold that its determination as to the lawfulness of any particular program “would necessarily depend on the reasonableness of the terms and conditions of any tariff regulation subsequently enacted.” *Id.* at 317-18.¹

Federal courts have confirmed the validity of the Board’s approach, holding that “[t]he STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to [§ 10702(2)] . . . in the wide variety of factual circumstances encountered.” *Granite State*, 417 F.3d at 92; *see also Decatur Cty. Comm’rs v. Surface Transp. Bd.*, 308 F.3d 710, 716 (7th Cir. 2002) (approving Board’s fact-specific methodology for assessing whether embargo is reasonable).

In short, the Board’s practice of “tailor[ing] its analysis to the evidence proffered and arguments asserted under a particular set of facts” to determine whether a tariff provision is reasonable as it is applied in that situation is well-established by ICC, STB, and federal court precedent. *North America Freight Car Ass’n*, slip op. at 8. It also accords with common sense. The reasonableness of any particular railroad practice necessarily depends on a variety of individualized factors. The Board must consider the reasons for the challenged practice, which could include safety, efficiency, the need to prevent equipment and track damage, and a myriad of other business reasons. It must consider any burdens claimed by the parties challenging the

¹ *See also Rerouting of Traffic*, Ex Parte No. 376, 364 I.C.C. 175, 178 (1980) (“We cannot prejudge in a rulemaking whether or not specific practices are reasonable. Such determinations require case-by-case assessment.”)

practice, and it must balance those burdens against the benefits of the practice to shippers, and the railroad, and the advancement of the Rail Transportation Policy of 49 U.S.C. § 10101.

This case well illustrates the wisdom of the Board's case-by-case policy. The reasonableness of the tariff at issue depends upon "factually intense" questions (Dec. 1 Order at 3) such as the effect of coal dust on roadbeds and ballast on the lines at issue; the potential for coal dust to contribute to derailments; the efficacy of the standards in the challenged tariff provision in reducing coal dust loss; and the ability of shippers to comply with the tariff. The Board's resolution of this declaratory order proceeding will therefore turn on the unique factual circumstances at issue here.

The Board should ensure that its fact-specific determination of whether the BNSF tariff is reasonable does not unduly constrain the Board from a full consideration of the reasonableness of other practices that may be presented to the Board in the future. It should also ensure that its decision in this proceeding does not prevent railroads faced with different factual circumstances from adopting appropriate and reasonable practices, including practices related to coal dust issues arising under other unique circumstances perhaps not even contemplated by BNSF or the tariff provision at issue here. The best way for the Board to do so is to make clear that its decision in this case is based on the unique facts presented here and its well-established case-by-case approach to unreasonable practice determinations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Paul Moates", is written over a horizontal line.

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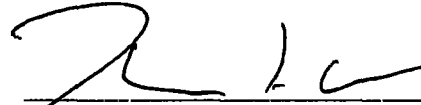
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Counsel for Norfolk Southern Railway Company

Dated: March 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2010, I caused copies of the Opening Comments of Norfolk Southern Railway Company to be served by first-class mail or more expeditious means on all Parties of Record in STB Finance Docket No. 35305.


Matthew J. Warren